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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. SARON GREEN, Defendant and Appellant.	F075978 (Super. Ct. No. BF130354A) **OPINION**

APPEAL from a judgment of the Superior Court of Kern County. John W. Lua, Judge.

Robert H. Derham, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Catherine Chatman and R. Todd Marshall, Deputy Attorneys General, for Plaintiff and Respondent.

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SaRon Green (defendant), then a minor, was tried and convicted as an adult. His convictions and sentence were affirmed on appeal, and the matter was remanded to the trial court for the limited purpose of permitting him to make a record of information relevant to his eventual youth offender parole hearing. Following those proceedings, he again appeals. We hold: (1) Defendant is entitled to a juvenile fitness/transfer hearing, under a law that went into effect after our previous opinion was filed but before remittitur issued, despite the limited nature of our remand order in the prior appeal; (2) Whether defendant is entitled to have the trial court exercise its new discretion to dismiss or strike his firearm enhancements depends on the outcome of the juvenile fitness/transfer hearing; (3) The trial court did not abuse its discretion by denying defendant's motion to continue the hearing for which we remanded the matter; and (4) Any claim of ineffective assistance of counsel must be made by way of a petition for writ of habeas corpus.

FACTS AND PROCEDURAL HISTORY

On September 20, 2009, defendant (who was 17 years old at the time) and several cohorts approached a 7-Eleven store in Bakersfield, intending to rob it. As they neared the store, police arrived. Defendant shot and wounded one of the officers before being shot himself.

Defendant was convicted of premeditated attempted murder of a peace officer engaged in the lawful performance of his duties (Pen. Code,[1] §§ 187, subd. (a), 189, 664, subd. (e); count one), assault with a semiautomatic firearm on a peace officer (§ 245, subd. (d)(2); count two), attempted second degree robbery (§§ 212.5, subd. (c), 664; count three), conspiracy to commit second degree robbery (§ 182, subd. (a)(1); count four), possession of a loaded firearm in public by a gang member (former § 12031, subd. (a)(2)(C), now § 25850, subd. (c)(3); count five), and active participation in a criminal street gang (§ 186.22, subd. (a); count seven). As to counts one through four,

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[1] All statutory references are to the Penal Code unless otherwise stated.

the jury found the offense was committed for the benefit of or in association with a criminal street gang (§ 186.22, subd. (b)), and that defendant personally and intentionally discharged a firearm, causing great bodily injury (§ 12022.53, subd. (d)). As to counts five and seven, the jury found defendant personally used a firearm, and personally inflicted great bodily injury, in commission of the offense. (§§ 12022.5, subd. (a), 12022.7, subd. (a).) Defendant was sentenced to a total unstayed term of eight years plus 65 years to life in prison.

On defendant's first appeal, we affirmed the judgment in its entirety. The California Supreme Court granted review and remanded the case to us with directions to vacate our decision and to reconsider the cause in light of *People v. Franklin* (2016) 63 Cal.4th 261, 283-284 (*Franklin*). We again affirmed the judgment — expressly including the sentence — but remanded the matter to the trial court for a determination whether defendant was afforded sufficient opportunity to make a record of information relevant to his eventual youth offender parole hearing and, if not, to afford him that opportunity. The opinion was filed October 31, 2016.

On November 8, 2016, voters enacted Proposition 57, the "Public Safety and Rehabilitation Act of 2016" (Proposition 57). It went into effect the next day. (Cal. Const., art. II, § 10, former subd. (a).) Insofar as is pertinent, Proposition 57 eliminated the People's ability to initiate criminal cases against juvenile offenders anywhere but in juvenile court. Instead, it requires prosecutors to commence such actions in juvenile court. If a prosecutor wishes to try a juvenile as an adult, the juvenile court must conduct a fitness or transfer hearing to determine whether the matter should remain in juvenile court or be transferred to adult court. Only if the juvenile court transfers the matter to criminal (adult) court can the juvenile be tried and sentenced as an adult. Proposition 57 also removed the presumption of unfitness that previously attached to the alleged commission of certain offenses. (See generally Welf. & Inst. Code, §§ 602, 707, subds. (a), (b); *People v. Superior Court (Lara)* (2018) 4 Cal.5th 299, 303 (*Lara*).)

Remittitur issued with respect to our second opinion on January 3, 2017. On March 2, 2017, the trial court set the matter for hearing in accordance with the remittitur. On March 13, 2017, Daryl Hargis, defendant's codefendant, acting in pro per., filed a motion to have his case remanded to juvenile court pursuant to Proposition 57. The People responded that (1) the subject of the motion fell outside the scope of the hearing permitted by this court's remand, and (2) Proposition 57 did not apply retroactively in any event.

On April 17, 2017, defendant appeared with the attorney who had been his trial counsel (and who, on Jan. 5, 2017, had been notified by mail of the filing of the remittitur) and orally joined in Hargis's Proposition 57 motion. As both defense counsel asked for a continuance, the matter was set for May 22, 2017.

On May 22, 2017, the trial court ruled it had no jurisdiction to entertain the Proposition 57 motion, and denied it on that basis. The court remarked that the motion would be better heard by the court that had jurisdiction, namely the Court of Appeal. Because defense counsel was not prepared to proceed with the *Franklin* hearing, the court continued the matter to June 21, 2017, but warned that would be the last date the matter would be heard.

On June 21, 2017, the court found defendant was not provided an adequate opportunity previously to present any evidence or information he wished to memorialize for purposes of consideration by parole boards in the future. Accordingly, it stated it would provide such opportunity at that time. It denied defense counsel's request for a further continuance and, when counsel was unable to present any evidence or information to memorialize for further proceedings, remanded defendant so he could resume serving his previously imposed sentence.

Effective January 1, 2018, sections 12022.5, subdivision (c) and 12022.53, subdivision (h) were amended, pursuant to Senate Bill No. 620, to allow trial courts to strike or dismiss, in the interest of justice pursuant to section 1385, firearm enhancements otherwise required to be imposed by those sections. (Stats. 2017, ch. 682, §§ 1, 2.)

On February 1, 2018, the California Supreme Court held that "Proposition 57 applies to all juveniles charged directly in adult court whose judgment was not final at the time it was enacted." (*Lara, supra,* 4 Cal.5th at p. 304.)

DISCUSSION

I

PROPOSITION 57 AND SENATE BILL NO. 620

Defendant contends the case must be remanded (1) for a fitness/transfer hearing in juvenile court and (2) so the court can exercise its discretion whether to strike the firearm enhancements. As to the first claim, the Attorney General says issues pertaining to Proposition 57 are barred by the limited nature of our remand in defendant's second appeal.[2] As to the second claim, the Attorney General says the amendments to the firearm enhancements are beyond the scope of the appeal following the limited remand. He further says that while the People concede the retroactivity of the amendments to cases not yet final upon appeal, defendant's judgment and sentence became final before the amendments went into effect and so the amendments do not apply to him.

In *People v. Hargis* (Mar. 20, 2019, F076087) ___ Cal.App.5th ___ [2019 Cal.App. LEXIS 233] (*Hargis*), we concluded that despite the limited nature of our remand in this matter, the trial court should have entertained and granted the defendant's motion for a juvenile fitness/transfer hearing. Under the circumstances of the case and in

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[2] The Attorney General also takes the position Proposition 57 does not apply retroactively to defendant. As noted, the California Supreme Court held otherwise in *Lara*, which was decided after briefing was completed in this appeal. Accordingly, we do not further address the retroactivity of Proposition 57.

light of the California Supreme Court's conclusion Proposition 57 applies to *all* juveniles whose cases were filed directly in adult court and whose convictions were not final at the time of its enactment (*Lara*, *supra*, 4 Cal.5th at p. 304), we found the trial court had the power to hear a motion on an issue that could not have been raised on the defendant's prior appeal, and that concerned a change in the law that altered the court's authority to adjudicate the defendant's case in criminal (adult) court in the first instance. (*Hargis*, *supra*, at pp. ___-___ [2019 Cal.App. LEXIS at pp. *13-*14].) We further noted that regardless of the scope of the prior remand, the Proposition 57 issue had now been brought before us, and the defendant clearly was entitled to a juvenile fitness/transfer hearing. (*Hargis*, *supra*, at p. ___ [2019 Cal.App. LEXIS at p. *14].)

We see no reason to conclude otherwise in defendant's case. Accordingly, we will conditionally reverse his convictions and sentence, as more fully set out in our disposition, *post*.[3]

The Attorney General suggests a remand is unnecessary since the trial court specifically found defendant fit to be tried and sentenced as an adult. Defendant says the Attorney General's citation is to a brief aside made by the court at sentencing.

The record before us in the present appeal contains no reference to a previous finding of unfitness.[4] If one was made, it would not change our conclusion. "[T]here are key differences between a Proposition 57 transfer hearing and the analogous fitness hearing under prior law. Most notably, Proposition 57 shifts the burden of proof in the

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3 Defendant is not entitled to a jurisdictional hearing, or the equivalent of a second trial, in juvenile court, however. (*Lara*, *supra*, 4 Cal.5th at pp. 309-310.) Nor is a conditional reversal unfeasible because defendant has reached an age beyond the juvenile court's jurisdiction. (See *Hargis*, *supra*, ___ Cal.App.5th at p. ___, fn. 4 [2019 Cal.App. LEXIS at p. *15, fn. 4].)

4 We may, of course, take judicial notice of the record of defendant's prior appeal. (Evid. Code, §§ 452, subd. (d), 459, subd. (a).) Neither party has asked us to do so, however (see Cal. Rules of Court, rule 8.252(a)), and we see no reason to do so on our own motion.

hearing. Under prior law, the juvenile court was bound by a rebuttable presumption that the defendant was not fit for the juvenile court system, whereas under current law there is no such presumption. [Citation.] In addition, the court at [defendant's] fitness hearing could not retain jurisdiction unless it found him fit for juvenile court under all five criteria. [Citation.] In a transfer hearing under current law, the court must consider all five factors, but has broad discretion in how to weigh them. [Citation.]" (*People v. Garcia* (2018) 30 Cal.App.5th 316, 324-325; accord, *J.N. v. Superior Court* (2018) 23 Cal.App.5th 706, 711.)

In *Hargis*, we further determined that whether the defendant was entitled to have the trial court exercise its new discretion, granted by Senate Bill No. 620, to dismiss or strike any of his firearm enhancements depended on the outcome of his juvenile fitness/transfer hearing. (*Hargis, supra*, ___ Cal.App.5th at p. ___ [2019 Cal.App. LEXIS at p. *18].) This was so, we explained, because Senate Bill No. 620 and the associated amendment to section 12022.53 (and, by parity of reasoning, section 12022.5) apply retroactively to *nonfinal* cases, and the defendant's judgment — including the sentence — was final before the amendment went into effect; but, his judgment was not final when Proposition 57 went into effect, and the fashioning of an appropriate disposition under the juvenile court law would be the equivalent of resentencing as contemplated by sections 12022.5, subdivision (c) and 12022.53, subdivision (h). (*Hargis, supra*, at pp. ___-___ [2019 Cal.App. LEXIS at pp. *15-*19].) We reach the same conclusion, for the same reasons, here.

II

THE *FRANKLIN* HEARING

Defendant contends he should receive a new, meaningful opportunity to collect, preserve, and present mitigating evidence that he may later use in a youth offender parole hearing under section 3051. (See *Franklin, supra*, 63 Cal.4th at pp. 283-284.) He says the trial court abused its discretion by denying his motion for a continuance, and his

attorney deprived defendant of the effective assistance of counsel by failing properly to present good cause for the continuance motion or by failing to conduct a timely and thorough investigation within the scope of the remand.

A. Background

As previously described, the matter initially was calendared for April 17, 2017, then continued to May 22, 2017, at the request of both defendant's and Hargis's attorneys. On May 22, 2017, the court observed, based on discussions in chambers, that defendant's attorney was not prepared to proceed with respect to the *Franklin* hearing that day, but would be ready on June 21, 2017. Defendant's attorney confirmed that was correct. The court stated: "Counsel, the Court is going to continue the hearing on the remittitur on appeal to June 21st, 2017. That will be the last date that this matter will be heard on this calendar, so counsel will have that opportunity alone, if the Court deems it appropriate at that time, to present any evidence it [*sic*] wishes for subsequent review and consideration during different proceedings of this case."

On June 21, 2017, defense counsel acknowledged the court's statement at the previous hearing, but explained:

> "And I indicated to my . . . investigator the need to expedite what needed to be done for this case. Although I attempted to do that, my investigator sent me this note yesterday at 2:49 P.M. . . .
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> "And, in essence, what she told me is that for the purposes of the hearing on [defendant], she had contacted the witnesses and she had sequestered [*sic*], but not yet received, records from schools, employers, and other records that we believe are necessary in order to reserve [*sic*] the record for the time when [defendant] goes before the parole board in the near future. . . . [S]he also indicated that she had run out of hours, which, again, is the first time I was told that.
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> "So I am unable, at this moment, to present to the Court any evidence on behalf of my client, and I would be asking the Court to permit me more time so that I could complete that investigation.

"We have used as much resources as we have available and we simply have not been able to complete."

The trial court responded:

"[O]ver eight weeks in continuances, certainly passed [*sic*] the date upon which counsel was notified of the remittitur, does satisfy, in this Court's view, an adequate opportunity to make a record of information that would be relevant for a subsequent parole board.

"On that basis, the Court has given counsel an opportunity to prepare and, thereafter, present relevant information to be memorialized and this Court finds that the opportunity now has been completed.

"The record is going to reflect that counsel had an adequate opportunity to present information on today's date, that the case was continued numerous times on the defense's request to prepare for this hearing, and based on the representations, . . . I understand that witnesses have been contacted, or at least an investigator has made attempts to contact witnesses, but this was the opportunity and the date upon which information was to be presented, and it simply has not happened."

The court then remanded defendant. It permitted defense counsel to state for the record that he had made all possible attempts to gain documents that were in the control of governmental entities that only had to respond to the issuance of subpoenas, and then took their time in responding. Counsel stated it was "sad that we don't have a little more time so that we could get those records to present to the Court in a future hearing on behalf of [defendant], and to see what his future is."

B. <u>Analysis</u>

"Continuances shall be granted only upon a showing of good cause." (§ 1050, subd. (e).) "A 'trial court has broad discretion to determine whether good cause exists to grant a continuance of the trial. [Citation.] A showing of good cause requires a demonstration that counsel and the defendant have prepared for trial with due diligence.' [Citation.] Such discretion 'may not be exercised so as to deprive the defendant or his attorney of a *reasonable opportunity* to prepare.' [Citation.] 'To effectuate the constitutional rights to counsel and to due process of law, an accused must . . . have a

reasonable opportunity to prepare a defense and respond to the charges.' [Citation.]" (*People v. Roldan* (2005) 35 Cal.4th 646, 670, italics added, disapproved on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) The same principles apply to motions to continue sentencing or other hearings. (See, e.g., *People v. Snow* (2003) 30 Cal.4th 43, 70, 77; *People v. Johnson* (2013) 218 Cal.App.4th 938, 942.)

"[T]he decision whether or not to grant a continuance of a matter rests within the sound discretion of the trial court. [Citations.] The party challenging a ruling on a continuance bears the burden of establishing an abuse of discretion, and an order denying a continuance is seldom successfully attacked. [Citation.] [¶] Under this state law standard, discretion is abused only when the court exceeds the bounds of reason, all circumstances being considered. [Citations.] Moreover, the denial of a continuance may be so arbitrary as to deny due process. [Citation.] However, not every denial of a request for more time can be said to violate due process, *even if the party seeking the continuance thereby fails to offer evidence*. [Citation.] Although 'a myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality[,] . . . [t]here are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process.' [Citation.] Instead, '[t]he answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied.' [Citations.]" (*People v. Beames* (2007) 40 Cal.4th 907, 920-921, italics added; see *Morris v. Slappy* (1983) 461 U.S. 1, 11-12; *Ungar v. Sarafite* (1964) 376 U.S. 575, 589-590; *People v. Frye* (1998) 18 Cal.4th 894, 1012-1013, disapproved on another ground in *People v. Doolin*, *supra*, 45 Cal.4th at p. 421, fn. 22.)

Absent a showing of an abuse of discretion and prejudice to the defendant, denial of a motion to continue does not warrant reversal. (*People v. Doolin*, *supra*, 45 Cal.4th at p. 450; *People v. Barnett* (1998) 17 Cal.4th 1044, 1126.) Neither has been shown here.

To begin with, the record does not show diligence on the part of defense counsel. (See *U.S. v. Flynt* (9th Cir. 1985) 756 F.2d 1352, 1359, opn. mod. 764 F.2d 675, 675.) The trial court warned, when it granted the first continuance of the proceedings, that it would not grant a further request. Despite the court's caveat, defense counsel subsequently presented little more than an open-ended request for additional time. As he had already been afforded a reasonable opportunity to assemble relevant information, the trial court rationally could have concluded counsel was not diligently preparing for the *Franklin* hearing. (See *People v. Johnson* (1970) 5 Cal.App.3d 851, 859.)

Next, the trial court reasonably could have concluded a continuance would not be useful. (See *People v. Beeler* (1995) 9 Cal.4th 953, 1003; *U.S. v. Flynt*, *supra*, 756 F.2d at p. 1359.) "[T]o demonstrate the usefulness of a continuance a party must show both the materiality of the evidence necessitating the continuance and that such evidence could be obtained within a reasonable time." (*People v. Beeler*, *supra*, 9 Cal.4th at p. 1003.) Defense counsel failed to make an adequate showing here.

Finally, the record does not suggest defendant suffered any harm as a result of the trial court's denial. (See *U.S. v. Flynt*, *supra*, 756 F.2d at p. 1359.) We have no way of ascertaining, from defense counsel's showing, whether any information existed that might be helpful to defendant in his eventual youth offender parole hearing. Moreover, nothing prevented the marshaling and preservation of any information that was received (for instance, in response to subpoenas that allegedly had already been issued) for later use.

Defense counsel was given a reasonable period of time in which to obtain and present pertinent information at the hearing. (See *People v. Alexander* (2010) 49 Cal.4th 846, 935.) As the trial court did not act unreasonably or abuse its broad discretion by denying an additional continuance, we reject defendant's further claim the ruling violated his federal constitutional rights. (See *Morris v. Slappy*, *supra*, 461 U.S. at pp. 11-12;

People v. Reed (2018) 4 Cal.5th 989, 1005, fn. 8; *People v. Alexander*, *supra*, 49 Cal.4th at p. 935.)

Defendant further raises a claim of ineffective assistance of counsel.[5] The burden of proving ineffective assistance of counsel is on the defendant. (*People v. Pope* (1979) 23 Cal.3d 412, 425.) "To secure reversal of a conviction upon the ground of ineffective assistance of counsel under either the state or federal Constitution, a defendant must establish (1) that defense counsel's performance fell below an objective standard of reasonableness, i.e., that counsel's performance did not meet the standard to be expected of a reasonably competent attorney, and (2) that there is a reasonable probability that defendant would have obtained a more favorable result absent counsel's shortcomings. [Citations.] 'A reasonable probability is a probability sufficient to undermine confidence in the outcome.' [Citations.]" (*People v. Cunningham* (2001) 25 Cal.4th 926, 1003; see generally *Strickland v. Washington* (1984) 466 U.S. 668, 687-694.)

We cannot tell, from the record on appeal, whether there is a reasonable probability the motion for a continuance would have been granted if defense counsel had presented it in a different manner. (See *People v. Cunningham*, *supra*, 25 Cal.4th at p. 1003.) More importantly, the record does not disclose whether or what mitigating information existed that could have been memorialized had another continuance been granted. "[P]rejudice must be affirmatively proved . . . ." (*People v. Bolin* (1998) 18 Cal.4th 297, 333.)

On the record before us, even if we assume counsel's performance was deficient, we are unable to determine whether defendant suffered prejudice as a result. Accordingly, if defendant wishes to pursue a claim of ineffective assistance of counsel, he must do so by way of a petition for writ of habeas corpus. (See *People v. Cudjo*

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5 The Attorney General argues defendant had no federal right to counsel during the *Franklin* hearing, and questions whether even a state right existed. We decline to be drawn into that discussion and will assume the right to counsel existed at the hearing.

(1993) 6 Cal.4th 585, 634.) We reject defendant's assertion that consigning him to that remedy places him in a "Catch-22" situation. Such an argument misperceives what defendant would be required to show in order to present a successful habeas claim. It also ignores the fact defendant himself would be in a position to know, and assert in habeas proceedings, whether his school and employment records, at the very least, might contain information that could be helpful to him. That defendant might not be entitled to (but could request appointment of) counsel in a habeas proceeding does not render such a remedy illusory. Nor does it, as defendant claims, render anything less than a remand for a new hearing, with new counsel and adequate time to prepare, a violation of the Eighth Amendment to the United States Constitution.

DISPOSITION

The convictions and sentence are conditionally reversed and remanded to the juvenile court with directions to conduct a juvenile transfer hearing. (Welf. & Inst. Code, § 707.) When conducting said hearing, the juvenile court shall, to the extent possible, treat the matter as though the prosecutor had originally filed a juvenile petition in juvenile court and had then moved to transfer defendant's cause to a court of criminal (adult) jurisdiction. (*Id*., subd. (a)(1).)

If, after conducting the juvenile transfer hearing, the juvenile court finds it would *not* have transferred defendant to a court of criminal (adult) jurisdiction, it shall treat defendant's convictions as juvenile adjudications; exercise its discretion under Penal Code section 12022.53, subdivision (h), as amended by Senate Bill No. 620 (Stats. 2017, ch. 682, § 2, eff. Jan. 1, 2018); and impose an appropriate disposition within its discretion.

If, after conducting the juvenile transfer hearing, the court determines it would have transferred defendant to a court of criminal (adult) jurisdiction because he is not a fit

and proper subject to be dealt with under the juvenile court law, then defendant's convictions and sentence shall be reinstated. (Welf. & Inst. Code, § 707.1, subd. (a).)

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DETJEN, J.

WE CONCUR:

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POOCHIGIAN, Acting P.J.

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FRANSON, J.